

## **ADMINISTRATIVE APPEAL DECISION**

**BRANNON HOMES; FILE NO. 2004-00912(0)**

**BUFFALO DISTRICT**

**JANUARY 31, 2006**

**Review Officer:** Michael Montone, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division

**Appellant:** Mr. Steven Philipppone, owner Brannon Homes

**Jurisdiction:** Section 404 of the Clean Water Act (33 U.S.C. 1344)

**Appeal Meeting and Site Visit Date:** June 2, 2005

### **Background Information:**

In February 2004, Lu Engineers (retained by the appellant) contacted the Buffalo District (District) and requested an approved jurisdictional determination (JD) for lands encompassing approximately 66 acres southwest of the intersection of Shoecraft and Plank roads, in the Town of Penfield, Monroe County, New York.

The site is bordered by Shoecraft Road and fallow agricultural land to the west, residential development and vacant land to the south, and scattered residential development and agricultural lands to the east, and residential lands and Plank Road to the north. Cover types throughout the property include upland fields, forest, scrub shrub and an old orchard.

The JD request submitted by Lu Engineers (LE) included a wetland delineation report based on a site inspection performed by LE on August 27, 2003. The delineation report, referred to as Technical Memorandum 1, described the property and identified one wetland area that met the criteria for wetlands as established by the 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual). LE refers to the wetland area as an isolated depression, approximately one acre in size. LE also reported that the distance between the wetland and a mapped water of the U.S. was 1500 feet and described the following drainage pattern:

...this wetland drains to an upland dead furrow and eventually outlets to a roadside drainage ditch. Water must reach a depth of at least 6-12 inches in the depression before it overflows via the wet swale to the dead furrow along the east side of the adjacent upland field.

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LE provided its opinion that the wetland area was not a water of the U.S. because it was an isolated, non-navigable, intrastate water located over 1000 feet away from a defined stream channel. LE reported that water must flow through artificial conduits including a man-made swale, roadside ditch, and storm sewer network before reaching a defined stream channel.

On May 17, 2004, the District performed a site inspection with representatives of LE and the New York State Department of Environmental Conservation. Based on this site visit, the District concluded that the wetland area was larger than the area delineated by LE in Technical Memorandum 1 and was hydrologically connected to the roadside ditch along Plank Road. The District also requested additional field data from LE to determine the extent of wetlands present in the northeast corner of the project site and a revised boundary map for the wetland area previously identified in Technical Memorandum 1 (hereafter referred to as the "2003 depression").

LE submitted a response to the District's request for additional information. This response was dated August 11, 2004, and is referred to as Technical Memorandum 2. In this memo, LE reported that the 2003 depression was 0.947 acre in size, and delineated two additional wetland areas referred to as "depression A" (0.145 acre) and "depression B" (0.252 acre).

In Technical Memorandum 2, LE noted that on June 9, 2004, the site received approximately 0.77 inches of rain and approximately four inches of standing water was present on the site on June 10. LE also reported the following findings regarding the hydrology of the three delineated depressions based on field observations made on June 10, July 9, and August 4, 2004:

- 1) no hydrologic connection existed between depression A and the roadside ditch along Plank Road on any of the days it was inspected.
- 2) flowing water discharged from depression B was carried to the roadside ditch along Plank Road via an identified rill. However, flow within this rill was only present on June 10, 2004 and ceased within a few hours.
- 3) small, isolated, standing pockets of water were present in a well traveled deer trail between depressions A and B on June 10, 2004. However, no evidence of flowing water was found between these depressions.
- 4) surface water from the 2003 depression discharges into a swale that carries water to another north-south swale (also referred to as an agricultural ditch or Town drainage ditch; District did not assert jurisdiction over this drainage feature) that outlets into the road side ditch along Plank Road.

On November 22, 2004, the District issued an approved JD to LE, stating that the three identified depressions (2003, A and B) are waters of the U.S. The District stated that

their JD was based upon their site visit during May 2004<sup>1</sup> and the additional information (Technical Memorandum 2) supplied by LE.

The appellant disagreed that the three depressions were waters of the U.S. and submitted his Request for Appeal (RFA) dated January 18, 2005.

**Summary of Decision: The District's administrative record supports its decision that wetlands regulated under the CWA are present on the appellant's property and the appeal does not have merit for the reasons discussed below.**

**Appeal Decision Evaluation, Findings and Instructions to the Buffalo District Engineer (DE):**

**Reason 1: Procedural Error/ No Basis for Jurisdictional Determination**

**Finding: This reason for appeal does not have merit.**

**Action: No action required.**

**Discussion:**

The appellant states that "[t]he JD must be reversed in light of the procedural error associated with its issuance, since it fails to set forth a 'basis for jurisdictional determination' as required under 33 CFR 330 [sic]."

Corps regulations at 33 CFR 331.2 state that an approved JD will include a basis of JD. These same regulations also define the basis of JD as:

...a summary of the indicators that support the Corps approved JD. Indicators supporting the Corps approved JD can include, but are not limited to: indicators of wetland hydrology, hydric soils, and hydrophytic plant communities; indicators of ordinary high water marks, high tide lines, or mean high water marks; indicators of adjacency to navigable or interstate waters; indicators that the wetland or waterbody is of part of a tributary system; or indicators of linkages between isolated water bodies and interstate or foreign commerce.

The appellant agrees that the District memorialized a connection, although tenuous in his opinion, within the administrative file. However, the appellant asserts that his "due process rights" were impacted when the District neglected to state its basis of JD in the approved JD letter. During the appeal meeting the appellant stated the District committed a procedural error by neglecting to state that their JD was based on an established connection between the wetlands and an interstate, navigable water. The appellant feels this procedural error affected his due process rights because he did not understand the

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<sup>1</sup> The District incorrectly cited a site visit of May 14, 2004 in their approved JD letter. Documents within the administrative record indicate that the May 2004 site visit took place on the 17th.

basis and was forced to proceed with the appeal process. The appellant also believes the administrative record is incomplete.

During the appeal meeting, the District clarified that the three depressions are wetlands that are part of a surface water tributary system that ultimately discharges into Irondequoit Bay, an interstate, navigable water. While the District adequately documented this connection in its Rationale for Decision and site notes, the District did not state this in its JD letter.

The District committed a procedural error when it omitted a basis of JD from its approved JD letter. However, this procedural error is administrative in nature and does not impact the appellant's due process as the appellant retained his right to appeal the District's decision regardless of the status of the basis of JD. Therefore, the lack of a basis of JD in the approved JD letter is harmless since including this information would not have influenced the District's JD decision and did not affect the appellant's right to an appeal. Therefore, this reason for appeal does not have merit.

**Reason 2: Incorrect application of Law, Regulation and Policy and Incorrect Application of Current Regulatory Criteria and Guidelines for Identifying and Delineating Wetlands (Appellant's request for appeal reasons 2 and 4)**

**Finding: This reason for appeal does not have merit.**

**Action: No action required.**

**Discussion:**

**Erroneous Application of Law and Regulation**

The appellant states that any jurisdictional status of the three depressions is predicated upon the ephemeral hydrologic connection between Depression "B" and a man-made roadside ditch located along the south side of Plank Road. During the appeal meeting, the appellant acknowledged a surface water connection, although tenuous in his opinion, between the three depressions and Irondequoit Bay that spans approximately 0.5 mile as follows:

- 1) approximately 50 feet of rill carrying ephemeral discharge from depression "B" to the man-made drainage ditch on the south side of Plank Road;
- 2) approximately 1050 feet of non-jurisdictional man-made, roadside drainage ditch to a storm sewer pipe system;
- 3) approximately 560 feet of storm sewer pipe discharging to a man-made agricultural drainage ditch on the north side of State Road;
- 4) approximately 941 feet of man-made drainage ditch carrying drainage to the point where it joins a mapped, unnamed, perennial tributary of Irondequoit Bay.

However, the appellant states that any nexus between the three depressions and Irondequoit Bay (a navigable water) is insignificant and ephemeral, with potential discharges only occurring during/after unusual heavy rainfall events. Therefore, the appellant asserts that the three depressions lack a significant nexus to navigable waters of the U.S. and concludes that the JD violates the jurisdictional limits set forth in law by the U.S. Supreme Court's ruling, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC") and regulations that define the term adjacent.

#### Erroneous Application of Law

In *SWANCC*, the U.S. Supreme Court addressed Corps jurisdictional regulatory provisions in construing the Clean Water Act (CWA) term "waters of the United States". The Supreme Court in *SWANCC* held that use of "isolated", non-navigable, intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. 531 U.S. at 166-174 (emphasis added). The *SWANCC* decision did not cast doubt on the validity of the Corps regulations governing "adjacent wetlands," which the Supreme Court upheld in *United States v. Riverside Bayview*, 474 U.S. 121 (1985) (emphasis added). The Corps' regulations that assert authority over discharges of pollutants into wetlands "adjacent" to other waters within the purview of the CWA are based on an interpretation of the statute that is reasonable and consistent with the Commerce Clause. The Corps does not exercise CWA permitting authority over discharges into "adjacent wetlands" merely because of geographical occurrence, but rather because these wetlands as a class have significant functional relationships – including hydrological connections – with the waters to which they are adjacent. The Court also recognized in *Riverside Bayview* that the regulatory definition of waters of the U.S. may include some wetlands without a significant nexus, and expressed that the Corps undertake such circumstance by issuing a permit for, rather than prohibiting, discharges of fill materials.

The hydrological connection between: the three depressions and the roadside drainage ditch; and the roadside drainage ditch and an unnamed tributary to Irondequoit Bay, is substantially documented in the administrative record by documentation generated by the District as well as information submitted by the appellant.

The District's Rationale for Decision documents the hydrologic connections of the three depressions to the roadside ditch along Plank Road.

Based upon our site inspection...[District staff] agreed that the wetland [2003 depression] was not isolated but hydrologically connected to an agricultural drainage swale to roadside ditch.

These two small wetland areas [depression A and B] are hydrologically connected to the roadside ditch along Plank Road based upon evidence of small drainage rivulets [District staff] observed.

The District's site notes from their site inspection on May 17, 2004 detail the: connection between the 2003 depression and the roadside ditch along Plank Road; and the connection between the roadside ditch and Irondequoit Bay.

...and an overflow outlet was observed at the western edge of the delineated area [2003 depression] that flowed into a grassy drainage swale along the western edge of the forested area. This drainage ditch begins at the end of a plastic drain pipe that the Town of Penfield installed behind the Merz barn to divert roadside drainage along Shoecraft Road [south of appellant's property] onto the Merz property [western boundary to appellant's property] where is [sic] flows west then north to the roadside ditch along Plank Road. According to the consultant, water in this ditch is intercepted by a culvert at the intersection of Plank and State Roads, and eventually discharges into an unnamed tributary of Irondequoit Bay...

As discussed above in the Background section, the appellant references similar surface water connections in Technical Memorandum 1 and 2.

In response to questions posed during the appeal meeting, the District clarified that the three depressions are adjacent to the surface water tributary system which flows into Irondequoit Bay. Based on the documentation evident in the administrative record, the District's JD is reasonable and this reason for appeal does not have merit.

#### Erroneous Application of Regulation

The appellant asserts that the three depressions fail to meet the jurisdictional criteria for adjacency as set forth in 40 CFR 230.3(b)<sup>2</sup> and lack a significant measure of proximity to navigable waters of the U.S. The appellant asserts that adjacency cannot include every possible source of water that eventually flows into a navigable water and concludes that the JD violates the jurisdictional limits set forth in the regulations.

The term adjacent is defined at 40 CFR 230.3(b) and at 33 CFR 328.3(c) as bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent wetlands". In response to questions posed during the appeal meeting, the District clarified that the three depressions are adjacent to the surface water tributary system which flows into Irondequoit Bay. Based on the documentation evident in the administrative record as discussed above, the District's JD is reasonable and this reason for appeal does not have merit.

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<sup>2</sup> The appellant incorrectly referenced 33 CFR 230.3(b) in his RFA when discussing the term adjacent. Regulations at 40 CFR 230.3(b) address the term adjacent.

The appellant stated that since the three depressions lack a significant nexus to interstate, navigable waters, they are intrastate waters and their jurisdictional status should be considered accordingly. As such, the appellant argues that the District failed to adhere to the adopted policy of the Corps and the U.S. Environmental Protection Agency of formally seeking project-specific approval from the Corps' Headquarters prior to asserting jurisdiction over waters based on factors listed in 33 CFR 328.3(a)(3). Furthermore, the appellant states that even if the District followed this procedure, the three depressions located on the property fail to meet the criteria listed in 33 CFR 328.3(a)(3).

During the appeals meeting, the District clarified that they asserted jurisdiction based on 33 CFR 328.3(a)(7) and not 328.3(a)(3). The District stated during the appeal conference that the wetlands are adjacent to the roadside ditch which is part of a surface water tributary system that discharges into Irondequoit Bay; hydrological connections were observed between the wetlands and the roadside ditch; and defined the connection as confined, overland flow. Based on the documentation evident in the administrative record as discussed above, the District's JD appears reasonable and this reason for appeal does not have merit.

#### Erroneous Application of Policy

The appellant refers to a report published by the Government Accountability Office (formerly the General Accounting Office or "GAO") titled *Water and Wetlands, Corps of Engineers Needs to Evaluate its District Office Practices in Determining Jurisdiction*. According to the GAO report, the Buffalo District asserts jurisdiction over wetlands separated from other waters of the U.S. by no more than one man-made barrier (see report page 19). The appellant states that the three depressions cannot be considered as being adjacent or having a hydrological connection to a water of the U.S. since any drainage must travel through non-jurisdictional, man-made roadside ditches and piped storm sewers systems to reach a point where jurisdictional status could be asserted. Therefore, the appellant concludes that the three depressions do not fall within the Corps' jurisdiction as defined by the Buffalo District in the GAO report.

The appellant also states that the GAO reported to Congress that the practices performed by the Corps' District Offices in determining jurisdiction over isolated, intrastate wetlands are inconsistent and require further review and policy formulation. Therefore, the appellant concludes that until the Corps re-evaluates its standards for JDs in light of the GAO Report, it has no basis to assert jurisdiction over the three depressions.

The GAO is an independent and nonpartisan agency that evaluates federal programs, audits federal expenditures, and issues legal opinions. Congress may request the GAO to study federal programs and report its findings. In this role, GAO may advise Congress and the Executive Branch on ways to improve the effectiveness and response of the federal government. While the recommended actions of GAO may lead to laws and acts that improve government operations, the reports themselves do not constitute law,

regulation, or officially promulgated Corps policy and is not binding on Corps JD decisions. Therefore, this reason for appeal does not have merit.

Erroneous Application of the Guidelines Promulgated by the U.S. Department of Interior's Fish and Wildlife Service (USFWS)

The appellant asserts that the three depressions are not jurisdictional wetlands based on an observed lack of wetland functions. The appellant states that the USFWS published an assessment of the characteristics and status of geographically isolated wetlands in response to SWANCC. The report, by R.W. Tiner et. al, is titled *Geographically Isolated Wetlands: A Preliminary Assessment of their Characteristics and Status in Selected Areas of the United States* and was published in 2002. The appellant states that based on the USFWS guidelines published in this report, the three depressions fail to meet the criteria of functioning isolated wetlands, therefore, they do not fall within the jurisdictional scope of waters of the U.S.

The report cited by the appellant clearly states in its introduction that there was no intent to address jurisdictional questions about isolated wetlands. The purpose of the report was to provide an introduction to isolated wetlands to assist resource managers and the general public in gaining a better perspective and understanding of these wetlands. As such, the report does not constitute law, regulation, or officially promulgated Corps policy and is not binding on Corps JD decisions. Therefore, this reason for appeal does not have merit.

**Reason 3: Omission of Material Fact**

**Finding: This reason for appeal does not have merit.**

**Action: No action required.**

**Discussion:**

The appellant asserts that the JD omits material facts supporting its ruling by failing to set forth a basis for jurisdictional determination and does not consider the findings of Technical Memorandum 2 that the three depressions are isolated, not hydrologically connected, and do not meet the functional criteria for isolated wetlands under the USFWS criteria.

As discussed in Appeal Reason 1, the lack of a Basis for Jurisdiction is harmless and this reason for appeal does not have merit.

As discussed in Appeal Reason 2, the appellant presents multiple reasons why the three depressions should not be considered jurisdictional wetlands. In presenting his argument, the appellant also refers to the fact that these arguments were presented to the District in Technical Memorandum 2. However, the District is not bound to accept or agree with an opinion merely based on its inclusion in the administrative record prior to its decision.



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Instead, the District is obliged to consider this information. During the appeal meeting, the District clarified that Technical Memorandum 2 was considered during their review and prior to making its JD. However, the District also stated that its observations during their site visit held more importance than the observations presented by the appellant in Technical Memorandum 2. While this specific thought process was not documented in the administrative record, the District did document their consideration of Technical Memorandum 2 by referring to it in its Rationale for Decision and stating in its approved JD letter that the JD was partly based on the additional information submitted by the appellant (Technical Memorandum 2 was submitted in response to the District's request for additional information). Therefore, this reason for appeal does not have merit.

**Conclusion: I find that the District's administrative record supports its decision that wetlands regulated under the CWA are present on the appellant's property. For the reasons stated above, the appeal does not have merit.**

A handwritten signature in black ink, appearing to read "Michael Montone", with a long horizontal flourish extending to the right.

Michael Montone  
Appeal Review Officer  
Great Lakes and Ohio River Division